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IN THE

Supreme Court of the United States

October Term, 1988

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), ET AL.,

Petitioners,

v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE COUNCIL ON RELIGIOUS FREEDOM AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Question Presented

Whether the Equal Access Act, to the extent that it requires public secondary school authorities to permit organized student religious club groups to hold meetings on school grounds, violates the Establishment Clause?

Statement of Interest

The American Jewish Committee ("AJC"), a national organization founded in 1906, is dedicated to the defense of the civil rights and civil liberties of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society.

The Council on Religious Freedom is a nonprofit corporation which was formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate the unnecessary entanglement of religion and state and other areas of concern which interfere with the full experience of religious freedom. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, and who recognize the importance of preserving and promoting the constitutional principle of the free exercise of religion and opposing any official endorsement of particular religious doctrines in contravention of the Establishment Clause of the First Amendment.

In the view of *amici*, to permit a secondary school student club to hold organized religious activities, with the implicit imprimatur of official approval that necessarily attaches to such a club, would violate the First Amendment's Establishment Clause. Parents who enroll their children in public schools to receive the secular education required by the State have a right to expect that their children will not be drawn away from their own faith and into another which may be anathema to them.

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v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL., RESPONDENTS

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE COUNCIL ON RELIGIOUS FREEDOM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Statement of the Case

Amici adopt the factual presentation set forth in Petitioners' Statement of the Case.

This brief is submitted with the consent of the parties.

Summary of Argument

The provisions of the Equal Access Act, 20 U.S.C. §§ 4071-4072 (1984) (the "Act"), which require public secondary schools maintaining a limited open forum to grant religious student groups access to school facilities on the same basis as other student clubs and activities, impermissibly advance religion and create excessive entanglement between state institutions and religion -- thus violating two prongs of the Establishment Clause test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

By failing to distinguish this Court's holding in *Widmar v. Vincent,* 454 U.S. 263 (1981), from the present case, the Court of Appeals for the Eighth Circuit erred when it ruled that the Act, insofar as it affords access to religious groups, was constitutional. Unlike *Widmar*'s university setting, the setting contemplated by the Act is that of a public secondary school. There can be no question that there are significant and cognizable differences between the impact of officially recognized religious groups meeting at these two types of institutions. College students are adults and are not subject to compulsory attendance laws. Not only are college students more mature and less impressionable, they have greater freedom to select and reject because of the independence that comes with adulthood and maturity.

Because students at schools affected by the Act are younger and more impressionable than those at universities and are also subject to compulsory attendance laws, these students might perceive the religious access required by the Act as bearing the

imprimatur of the school, thus having the effect of advancing religion. Moreover, because the Act allows school authorities to permit the occasional attendance of "nonschool person[s]" at meetings of student religious groups, clergy may enter schools and proselytize students, the effect of which would clearly advance religion.

While student free speech rights may be implicated when school authorities refuse to grant official recognition and access to school facilities to student groups based on the content of a group's speech, there was no constitutional violation in the school's action in the present case. This Court recognized in *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. __, 98 L. Ed. 2d 592 (1988), that public schools have legitimate pedagogical concerns which can be protected by exercising reasonable control over the content of those forms of student speech affirmatively promoted by the school. Access to school facilities by, and official registration of, student groups undoubtedly promote such groups affirmatively. Here, the interest in enforcing the separation of church and state in public schools is not only reasonable but compelling. In the conflict between the Free Speech Clause and the Establishment Clause, the balance must be weighted in favor of the State's compelling interest in preventing the appearance of official promotion of, and an impermissible entanglement with, religious activities in a public secondary school.

There is available no less restrictive alternative to prohibiting official recognition of, and access to school facilities by, student religious groups. The posting of disclaimers and notices disavowing school sponsorship or involvement with the meetings of such groups would

nevertheless leave open a serious potential for ostracization and stigmatization of those students who elect not to participate in such religious activities. Moreover, the danger of school faculty or monitors becoming entangled in decisions having religious dimensions -- possibly with members of the clergy who come onto school grounds -- would not be resolved by taking such an ameliorative action. These are the very types of dangers which led the Framers to create an Establishment Clause whose concerns are co-equal with the legitimate concerns protected by the constitutional right of free speech.

ARGUMENT

THE EQUAL ACCESS ACT, TO THE EXTENT THAT IT REQUIRES A PUBLIC SCHOOL HAVING A LIMITED OPEN FORUM TO PERMIT ORGANIZED STUDENT RELIGIOUS GROUPS TO HOLD MEETINGS ON SCHOOL GROUNDS, VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. Religious Expression and Secular Speech are Not Constitutionally Equivalent in All Cases Involving Public Fora.

The First Amendment to the Constitution mandates that "Congress shall make no law respecting an establishment of religion." As this Court explained in *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971), this provision was intended by the Framers "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." In serving that

end, the Framers instituted a governmental policy of "neutrality" with respect to religion, which requires that "[n]either a state nor the Federal Government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education,* 330 U.S. 1, 15 (1947). The Court recently reiterated this established principle in *Wallace v. Jaffree,* 472 U.S. 38 (1985), asserting that "the government must pursue a course of complete neutrality toward religion." *Id.* at 60.

To be sure, the First Amendment does not require -- or even contemplate -- a regime of hostility toward religion. This was made clear at the beginning of the Republic when the Establishment Clause was directly juxtaposed with the Free Exercise Clause. This theme was further explicated when the Court recognized, in *Widmar v. Vincent,* 454 U.S. 263, 270 (1981), that the Establishment Clause is "limited by" the Free Speech clause, so as to require that regulation of religious speech with respect to public fora on a content-related basis be subject to "applicable constitutional standards." To say this, however, is not to suggest that the constitutional standards which are "applicable" will always be identical for religious and non-religious speech.

Thus, in *Widmar,* the Court applied the well-settled rule that, in order for the state to justify a content-based exclusion of particular speech, it must show -- even with respect to religious speech -- that the challenged regulation is necessary to serve a compelling state interest and that it is narrowly drawn to serve that end. *Widmar,* 454 U.S. at 270 (citing *Cary v. Brown,* 447 U.S. 455, 461, 464-65 (1980)). Upon applying that test, the

Court found that a public university had failed sufficiently to meet this exacting standard in demonstrating why religious student groups should not be afforded the same access to university facilities as secular student groups.

In reaching that conclusion, the Court specifically acknowledged that the interest of the university in complying with its constitutional obligations under the Establishment Clause "may be characterized as compelling, " but found -- in that specific case -- that the compelling interest did not necessitate the barring of religious groups from the public forum. *Widmar,* 454 U.S. at 271. In so saying, the Court implicitly acknowledged that the "applicable constitutional standards" are not identical for religious and non-religious speech, and that application of those standards will not always lead to identical results. Indeed, had the Court found otherwise, it would have obviated the special concerns that led the Framers to deal with religious expression as a *sui generis* concern in the First Amendment. Where the treatment in a public forum of religious expression on the same basis as non-religious speech would, in a specific case, endanger the State's mandated "neutrality" with respect to religion, it follows that the compelling state interest in avoiding the establishment of religion may, in that case, prohibit the affording of "equal access" for religious groups in such a public forum, even while permitting -- or even mandating -- such access in another public forum. In each case the Court must analyze the particular facts in terms of the countervailing principles involved.

The Court is not new to making fine distinctions

based on specific fact patterns in the area of the Religion Clauses and public schools. Thus, in *Abington v. Schempp,* 374 U.S. 203 (1962), where the Court invalidated Bible reading and recitation of the Lord's Prayer in public schools, the Court distinguished the circumstances in that case from *Zorach v. Clauson,* 343 U.S. 306 (1952), in which the Court held that "released-time" programs which permit public school students to depart school premises during the school day in order to receive religious instruction **elsewhere** do not violate the Establishment Clause. "[The Bible reading and prayer recitation] are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in *Zorach v. Clauson.*" *Abington* at 223.

B. Public High Schools Generally are Not Limited Public Fora.

The First Amendment generally prohibits government from "restrict[ing] expression because of its message, its ideas, its subject matter or its content." *Arkansas Writers' Project v. Ragland,* 481 U.S. 221, 231 (1987).[1] This Amendment, however, "does not guarantee access to property simply because it is owned or controlled by the government." *Perry Ed. Assn. v. Perry Local Ed. Assn.,* 460 U.S. 37, 46 (1983). Because government, "no less than a

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[1] "The First Amendment, of course, is made applicable to the states by the Fourteenth Amendment. *See Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer v. Spock,* 424 U.S. 828, 836 (1976), the Court has distinguished between public fora, limited public fora, and non-public fora in determining "the extent to which [g]overnment can control access..." to public property. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 473 U.S. 788, 800 (1985).

Speakers can be excluded on a speech content basis from traditional public fora, such as public streets and parks, only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *Cornelius,* 473 U.S. at 800. The government can choose to create a "limited public forum" by designating "a non-traditional forum [as a place] for public discussion." *Cornelius,* 473 U.S. at 802. Content based exclusions from a limited public forum must meet the same requirements as those in a traditional forum. Id at 800. Access to non-public fora, on the other hand, "can be restricted [on the basis of speech content] as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius,* 460 U.S. at 800 (quoting *Perry,* 460 U.S. at 46).

Historically, public schools have not been considered public fora.

> The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating

> thoughts between citizens, and discussing public questions."

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. __, 98 L. Ed. 2d 592, 602-3 (1988) (citations omitted). Even so, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 506 (1969). In *Tinker,* the Court held that a public school cannot prohibit students from expressing personal views, even on controversial issues, unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Hazelwood,* 484 U.S. at __, 98 L. Ed. 2d at 602 (quoting *Tinker,* 393 U.S. at 509). But "[t]he question whether the First Amendment requires a school to tolerate particular student speech - the question that [the Court] addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood,* 484 U.S. at __, 98 L. Ed. 2d at 605.

Arguably, student free speech rights are implicated whenever school authorities grant official recognition -- and access to school facilities -- to some student groups but not others. The Court, however, has never held that the speech rights which public school students possess inside the schoolhouse gate are the same as those of non-students, or even of students outside the schoolhouse gate. Moreover, the First Amendment does not restrict political opinions, but it does restrict efforts that may lead to religious establishments.

> [T]he First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 682 (1986), and must be "applied in light of the special characteristics of the school environment." *Tinker,* 393 U.S. at 506. A school need not tolerate student speech that is inconsistent with its "basic educational mission," *Fraser,* 478 U.S. at 685, even though the government could not censor similar speech outside the school.

Hazelwood, 484 U.S. at __, 98 L. Ed. 2d at 602.

Thus, the Court in *Fraser* held that a public school could discipline a student for a "sexualiy explicit" speech given during a school sponsored assembly because the school was entitled to "disassociate itself" from speech that is "wholly inconsistent with the 'fundamental values' of public school education." *Fraser,* 478 U.S. at 685-6. Similarly, the Court in *Hazelwood* held that "educators do not offend the First Amendment by exercising editorial control over the style and **content of student speech in school-sponsored expressive activities** so long as their actions are reasonably related to legitimate pedagogical concerns." Id., 484 U.S. at __, 98 L. Ed. 2d at 606. (emphasis supplied).

Implicit in these holdings is that public schools normally are not public fora. The fact that a school has created a system of after-school clubs which is limited to

promoting the "basic educational mission" of the school[2] does not mean that a limited public forum has been created. "The government does not create a [limited] public forum by inaction or by **permitting limited discourse**, but only by intentionally opening a non-traditional forum for public discussion." *Cornelius,* 473 U.S. at 802 (emphasis supplied).

It is clear from the trial testimony of officials at Westside High School (WHS) that they have not intentionally opened WHS' facilities "for **indiscriminate** use by ... student organizations." *Hazelwood,* 484 U.S. at __, 98 L. Ed. 2d at 602-3 (citations omitted) (emphasis supplied). Thus, it may exclude certain groups from its officially sanctioned club system on a speech content basis in order to avoid religious influences in secular education, surely a "legitimate pedagogical concern[]." *Id.* at 606. It is not for the federal courts to second guess a school's "determination of what manner of speech [in school sanctioned activities] is inappropriate." Id. at 602.

Nevertheless, even if WHS is deemed to have created a limited public forum such that it must meet the far more demanding standards of justifying exclusions from traditional public fora,[3] or otherwise falls within the

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[2] Each and every existing student activity at WHS was required to, and did, advance the educational mission of the school. Joint Appendix ("J.A.") 220, 230, 296-97.

[3] "In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech..., [the state] must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar,* 454 U.S. at 269-70.

obligations imposed by the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984) (the "Act"), on a school maintaining a "limited open forum," the strictures of the Establishment Clause must take priority. As is shown below, those strictures are not only a reasonable concern in the environment of public schools but a compelling state interest that overrides certain free speech concerns and requires the denial of official school access and recognition of religious groups.

C. The Establishment Clause Prohibits Public Schools from Granting Official Recognition to Religious Student Groups.

The Establishment Clause was intended to protect against three primary evils: the "sponsorship, financial support, and active involvement" of the state in religious activity. *Walz v. Tax Commission,* 397 U.S. 664, 668 (1970). Recognizing that "a union of government and religion tends to destroy government and to degrade religion," *Engel v. Vitale,* 370 U.S. 421, 431 (1962), the Court has nowhere been more strictly watchful of the separation of church and state than in the case of the public elementary and secondary schools.[4] The Court has consistently invalidated any appearance of sponsorship or entanglement with religious practice in the schools. As

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[4] "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968) (quoting *Shelton v. Tucker,* 364 U.S. 479, 487 (1960).

Justice Frankfurter stated in his concurring opinion in *Illinois ex. rel. Mc Collum v. Board of Education,* 333 U.S. 203, 216 (1948),

> The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children ... in an atmosphere free of pressures in a realm ... where conflicts are most easily and most bitterly engendered.

The nature of school-age children and youngsters, who are generally acknowledged to be at an age where "non-conformity is not an outstanding characteristic," was also remarked upon by Justice Frankfurter as an important consideration. *Id.* at 227.

Thus, the Court has struck down as unconstitutional a state's practice of authorizing the recital of brief, denominationally neutral, "voluntary" prayers at the beginning of each school day (*Engel,* 370 U.S. 421), government sanctioned Bible readings and recitation of the Lord's Prayer in public schools (*Abington,* 374 U.S. 203), and state legislation authorizing the posting of the Ten Commandments on the walls of public classrooms (*Stone v. Graham,* 449 U.S. 39 (1980) (*per curiam*).

It is this scrupulous avoidance of any hint of endorsement of religious practice in the public school, a principle reinforced by the Court's holding in *Wallace v. Jaffree,* that must be borne in mind in applying the Establishment Clause to the case at bar. Because of the special role of the public schools, and the Court's special concern with the avoidance of placing improper

pressures on those who are the most impressionable, the Constitution requires public high schools to do that which public universities are forbidden to do, i.e., deny official recognition and "equal access" to school facilities (and the concomitant appearance of endorsement) to student religious groups. To the extent that this may be deemed to create a conflict between the Free Speech Clause and the Establishment Clause, the balance must be weighted in favor of the State's interest, recognized as compelling in *Widmar,* in preventing violations of the Establishment Clause in a public secondary school. 454 U.S. at 271.

In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), this Court set forth the by now familiar three-prong test for identifying Establishment Clause violations, the validity of which was reaffirmed by a majority of the Court in *Wallace v. Jaffree,* 472 U.S. at 55-56 (Court's opinion), 63 (Powell, J., concurring). Each of three requirements must be met if governmental practice is to be upheld against an Establishment Clause challenge: "First the [governmental practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion....: finally, the [practice] must not foster 'an excessive governmental entanglement with religion.'" *Lemon,* 403 U.S. at 612-13.

(i) Sectarian Legislative Purpose.

Amici do not dispute the secular purpose behind WHS' organized club system. The alleged secular purpose behind the Act, however, is open to question. The Act was enacted in the aftermath of the defeat of efforts to amend the Constitution to provide for

organized prayer as a part of the public school day which the Constitution, as currently written, prohibits. *See Wallace v. Jaffree,* 472 U.S. 38. As originally introduced, the Act singled out religious groups for preferred status. Only last minute amendments extended the provisions of the Act to a broader range of speech activity. However, even if the passage of the Act was motivated by a legitimate secular purpose, provisions of the Act violate the last two prongs of the *Lemon* analysis. "Illicit legislative intent is not the sine qua non of a violation of the First Amendment.... [The Court] has long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star v. Minnesota Comm. of Revenue,* 460 U.S. 575, 592 (1983) (citations omitted).

(ii) Principal or Primary Effect of Advancing Religion.

Implementation of the Act has a principal or primary effect of advancing religion. Concededly, "not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." *Committee for Public Education v. Nyquist,* 413 U.S. 756, 771 (1973). It is also acknowledged that the Court, in *Widmar,* looked to the forum's availability to a broad spectrum of groups in determining that the opening of the university's forum to a religious student group would not have the primary effect of advancing religion. *Widmar,* 454 U.S. at 274-75.

In so holding, however, the Court noted that "an open forum in a public **university** does not confer a

confirmation of State approval of religious sects and practices," *id.*, 454 U.S. at 274 (emphasis supplied), and specifically contrasted university and secondary students: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion." Id., 454 U.S. at 274 n.14. This factor, the lesser impressionability of older, college students and, accordingly, the lesser likelihood that such students would perceive a religious group as enjoying official endorsement, was treated by the *Widmar* Court as an independent factor justifying the opening of the university to religious groups, wholly apart from the fact that its open forum was available to a broad spectrum of groups, as the Act similarly provides.

It is the clear import of *Widmar* that, where such student perception of official imprimatur is likely to result, the opening of school facilities to a religious group would have, as a primary effect, the advancement of religion.

The distinction between university and high school settings was borne out, in *Tilton v. Richardson,* 403 U.S. 672 (1971), in which this Court upheld grants to church-related colleges and universities for the construction of buildings and facilities exclusively for secular educational purposes, based, in part, upon the observation that:

> There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination... The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the

> congressional objectives or limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunity for sectarian influence by virtue of their own internal disciplines.

Id., 403 U.S. at 686 (citing Gianelli, *Religious Liberty, Nonestablishment and Doctrinal Development, pt. II, the Nonestablishment Principle,* 81 Harv. L. Rev. 513, 583 (1968)). The Court has continued to recognize a distinction between university and secondary school students. "The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses [than with regard to students in public high schools]. '**This distinction warrants a difference in constitutional results.**'" *Edwards v. Aguillard,* __ U.S. __, __, 96 L. Ed. 2d 510, 519 n.5 (1987) (quoting *Abington,* 374 U.S. at 253) (emphasis supplied). This general distinction is reinforced by the fact that a substantial proportion of the students at a secondary school are subject to compulsory attendance laws. *McCollum,* 333 U.S. at 212.

High schools, in contrast to universities, present a more limited, socializing function, as one would expect in the context of a younger student body still being educated as to the broader values which will ultimately form the framework within which they can approach the give-and-take of college study. As this Court has stated, an important function of high schools is the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system." *Fraser,* 478 U.S. at 681. These differing roles of the high schools and colleges make clear that an officially recognized school religious organization in a secondary school is more likely to

appear to enjoy official endorsement than one at a university.[5]

This observation is further buttressed by the nature of organized student clubs at most modern American public schools. While a student group, by its very definition, requires student involvement in order to exist, this does not necessarily mean that students are always the initial impetus behind a group's formation. Teachers and administrators often play a major role in the creation and direction of school clubs.[6] Not surprisingly, most registered student groups at a modern American public secondary school are not merely tolerated but are affirmatively promoted by the school administration because of the socializing benefits of school club participation.[7] They further the secular educational mission of the school.[8] Religious clubs, by their very

[5] That differing role is made clear by this Court's determinations in *Hazelwood* and *Fraser*, in which cases school authorities were allowed to restrict the speech of secondary school students in a fashion which would be unacceptable for students at the university level. *See* the discussion in Section C above.

[6] In the case of WHS, all after-school student clubs are under the direct supervision of an assistant principal, to whom the faculty sponsors were accountable for the activities, goals, and objectives of their clubs. J.A. 342.

[7] At WHS, all existing student clubs are "officially sanctioned." J.A. 252.

[8] Petitioner School Board Policy 5610 recognizes student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." *Mergens v. Board of Education of the Westside*

nature, cannot further this secular mission. If schools are compelled by the Act to recognize religious groups and grant them access to school facilities, these groups will be the only type of club which schools would not, and constitutionally could not, hold implicitly or explicitly in favor. As discussed above, it is far from certain that students below the university level would be able to make this crucial distinction.

The risk of religious proselytization occurring on school grounds as a result of the Act cannot be dismissed. Parents who enroll their children in public schools to receive the secular education required by the State have a right to expect that their children will not be drawn away from their own faith and into another which may be anathema to them. A highschool student might be proselytized away from the family religion without the parents even being aware that it was transpiring, in of all places, a government institution, with the blessing of the government and the law. The courts could be faced with law suits filed by parents charging that the government allows proselytizing which steals the allegiance of students away from the family's traditional religion.

Respondent Mergens' proposed Christian Bible Club was to be "a vehicle for proselytizing those who had not yet 'accepted' Christ." J.A. 252. According to Rep. William F. Goodling, a prime sponsor of the Act, "[t]he Equal Access Act imposes only one basic requirement on school administrators. Student-initiated religious groups

Community Schools, 867 F. 2d 1076, 1077 (8th Cir. 1989).

must receive the same treatment as other student-initiated groups." 130 Cong. Rec. H 12273 (daily ed. Oct. 11, 1984). Respondent's group "sought all privileges enjoyed by other student activities, other than the 'right' to a school paid and selected 'sponsor' to direct its activities." J.A. 59. At WHS, as at most public high schools, "[o]fficial approval carrie[s] with it access to school facilities, including the bulletin board, public address system, and school year book. Recognized clubs aggressively recruit[] new members at an annual school-sponsored Club Fair, which [takes] place during the regular school day." J.A. 100-01, 119, 132, 155-56, 419-22. Access to these facilities, which "[s]tudents ... might reasonably perceive to bear the imprimatur of the school," *Hazelwood,* 484 U.S. at __, 98 L. Ed. 2d at 605, also provides religious groups with an effective means to proselytize their message on school grounds, occasional access to which even members of the clergy may be entitled.[9]

The "fundamental values... essential to a democratic society," the inculcation of which the Court time and time again has stressed is the mission of public education, "must, of course, include tolerance of

[9] The Equal Access act prohibits secondary schools deemed to have a "limited open forum" from denying "a fair opportunity to ... any students who wish to conduct a meeting within that limited open forum on the basis of the religious ... content of the speech at such meetings." 20 U.S.C. § 4071(a). Since schools are deemed to provide "a fair opportunity" when they provide that "nonschool persons may not direct conduct, control, or **regularly attend** activities of student groups," 20 U.S.C. § 4071(c)(5) (emphasis supplied), the Act leaves the schoolhouse gate open for the occasional visit of nonschool persons.

divergent... religious views... [and] must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students." *Fraser,* 478 U.S. at 682. A school can hardly be said to take into account the sensibilities of its students when it lends official access to its school sanctioned club system to religious groups, thus exposing its students to groups which, rather than expressing tolerance of the religious views of others, seek to indoctrinate them with their own particular views.

(iii) Likelihood of Excessive Entanglement.

The presence of school personnel during meetings of student groups, deemed by most school authorities to be an essential requirement for the proper running of a secondary school-- and, in many cases, compelled by insurance regulations-- creates a nearly unavoidable likelihood of excessive entanglement between religion and government.

The Act requires schools deemed to have a limited open forum not to allow nonschool persons to "direct, conduct, control, or regularly attend activities of student groups." 20 U.S.C. § 4071 (c)(5). Thus, school authorities would have to maintain detailed attendance records of nonschool persons, very possibly members of the clergy, and would have to interrupt and escort from school premises these outside persons when they violate the limitations imposed by the Act on their involvement with student groups. The sight of students in a classroom witnessing religious figures arguing with school officials about the frequency of their attendance and degree of involvement at religious meetings is surely one to be

avoided.

This Court has consistently struck programs of aid for secular purposes to religious schools where administration of that aid would involve a "comprehensive, discriminating and continuing... surveillance" to ensure that the aid was not utilized for a forbidden purpose. *Lemon*, 403 U.S. at 619. Thorough monitoring of religious meetings by school authorities -- necessary to insure that constitutional and statutory requirements, in addition to valid school policies, are not violated -- constitutes this very kind of forbidden involvement.

The form of entanglement that the Supreme Court deems most subversive of First Amendment values, however, is that which involves government not only in the **apparatus** of religion but in "religion's very **spirit**, in its decisions on core matters of belief and ritual." Tribe, *American Constitutional Law*, § 14-11 at 1231 (2nd ed. 1988) (emphasis in original). It is fear of this most divisive of entanglements -- determination of who is right and who is wrong in fundamental matters of conscience -- that has led the Court to require of the government "... a strict neutrality toward theological questions." *Abington*, 374 U.S. at 243 (Brennan, J., concurring).

The introduction of religious doctrines and disputes into public schools creates a situation where government cannot remain neutral. It is not uncommon for high schools to require all school recognized clubs to advance the educational mission of the school. At WHS, this includes a requirement that all student activities "present

balanced views on controversial issues." J.A. 245-48, 254-55, 326-27, 273. The enforcement of this policy very likely would conflict with the orthodoxy of a religious group whose world view derives from a single source of truth. It is not difficult to imagine other conflicts between school officials and religious groups, including those involving religious beliefs.[10]

The Court acknowledged in *Widmar* that attempts by state institutions to identify religious groups in order to separate them from secular groups necessarily involve some degree of entanglement between religion and government. Balancing this factor with the characteristics of a state university, the Court found this entanglement to be not constitutionally excessive in that setting. As demonstrated above, permitting public schools to recognize religious groups, or requiring it as the Act does, would, on balance, lead to far greater entanglement. In light of the heightened importance of preventing divisive religious influences from gaining a foothold inside public schools, school authorities must be allowed to make a limited determination of what is, and what is not, religious activity, if the Establishment Clause is not to be drained of all meaning.

D. No Less Restrictive Alternative is Available.

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[10] For example, at a school where official student groups are required to elect club officers, an election dispute could ensnarl the school administration in a fight over who the real officers of a religious club are. A similar conflict regarding a group's leadership could erupt where school rules require democratically elected officers but the religious beliefs of a group require appointment by a church hierarchy.

There is available no less restrictive alternative to the denial of permission for students to hold group religious meetings under public school auspices. As has been discussed above, a law requiring a public school to permit such organized activity has the effect of creating an appearance of official school endorsement and is likely to create impermissible entanglement between religion and government.

It is possible to argue that, in view of the publicity surrounding the present case in which WHS' challenge to the Act is well known, there is little chance that students -- at least at WHS -- will perceive that WHS approves of the religious groups desiring school access and recognition. However, the constitutionality of permitting or requiring public school authorities to grant official recognition and access to student religious groups must depend on the perceptions children will have at schools which do not engage in similar court challenges or otherwise attempt to disassociate themselves from religious activities. Moreover, even attempts at discrimination, such as posting disclaimers at classroom entrances, would still leave open a serious potential for proselytization, ostracization, and stigmatization of those students who elect not to participate in the religious activities, and of faculty entanglement with those activities.

The Establishment Clause confers cognizable rights upon individuals. The U.S. Solicitor General implicitly recognized this fact when he stated, in the United States' *amicus* brief filed in support of the petitioners in the *Bender* case, that "[t]he Establishment Clause, no less

than the Free Speech or Free Exercise Clauses, was intended as a guarantee of liberty." Brief for the United States as *Amicus Curiae* Supporting Petitioners in ***Bender v. Williamsport Area School District, et al.***, No. 84-773, at 13. Surely, this guarantee of liberty includes the right of public school students not to be subjected to any religious proselytization, ostracization, or stigmatization which is facilitated by the state. Prohibiting public schools from granting official recognition and access to student religious groups is the only means to protect this constitutional right.

E. No Plausible Free Exercise Claim Exists.

There is no merit to a claim that the refusal of school authorities to grant official school access to student religious groups violates the Free Exercise Clause. In order to obtain an exemption from a state requirement under this clause, a claimant must show that the requirement conflicts with, and thus burdens, "a sincerely held religious belief." *Frazee v. Employment Security Dept.*, __ U.S. __, 103 L. Ed. 2d 914, 920 (1989). *See Tony & Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 303 (1985) ("Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights").

In the present case, no conflict exists between the free exercise of respondents' beliefs and a state policy which prohibits public school authorities from granting official recognition to student religious groups. Just as "[n]o law prevents a student who is so inclined from praying

silently in public schools," *Wallace v. Jaffree,* 472 U.S. at 84 (O'Connor, J., concurring), no law or school regulation can prohibit students from assembling informally to discuss any topic, including religion, so long as such conduct does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of [a] school." *Tinker,* 393 U.S. at 509. There is nothing here to "accommodate". WHS administrators have done nothing to burden respondents' free exercise rights. Indeed, "[a]ny attempt by WHS to prohibit such informal meetings or exchanges between students, before or after instructional time, and even using school rooms or cafeteria tables, subject, of course, to reasonable time, place, and manner restrictions would meet strong constitutional objection." *Mergens v. Board of Education of the Westside Community Schools,* No. CV 85-0-426, Pet. for Cert. App. B at 30 (D.Neb. May 23, 1985). Cf. Tinker, 393 U.S at 513.

Thus, the only logical conclusion that can be drawn is that respondents object to a state policy prohibiting official recognition because their sincerely held religious beliefs require the state to acknowledge and promote their own beliefs. Respondents have not asserted this position. Nor is there evidence that the failure to grant official group recognition in any way burdens the exercise of their religion. But even if their beliefs included a demand that the state grant them official recognition, their claim would still fail.

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens... The

> Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

Bowen v. Roy, 476 U.S. 693, 699-700 (1986).

Furthermore, "[t]he mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption is justified. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707, 718 (1981). As previously demonstrated, the vigorous enforcement of separation of church and state in public schools is a compelling state interest which cannot be effectively achieved through any less restrictive means other than by prohibiting official school recognition of student religious groups.

It cannot be stressed enough that this constitutional prohibition in no way evinces hostility toward religion. "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not ... manifest a governmental hostility to religion or religious teachings." *McCollum,* 333 U.S. at 211. Such a policy is simply a recognition of the unique role of religion in American life. "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the

individual heart and mind." *Wallace v. Jaffree,* 472 U.S. at 53 n. 37 (quoting *Abington,* 374 U.S. at 226). Our forebears, long ago recognizing that religion differs from politics, art, philosophy, and other aspects of society, gave it special constitutional status. It is improper to accord religion a status equal to these other disciplines in the public schools. "[T]he grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jennes v. Fortsan,* 403 U.S. 431, 442 (1971).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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